

Valparaiso University ValpoScholar

Law Faculty Publications

Law Faculty Presentations and Publications

1996

The Cult of Finality: Rethinking Collateral Estoppel in the Postmodern Age

Laura Gaston Dooley
Valparaiso University School of Law

Follow this and additional works at: http://scholar.valpo.edu/law_fac_pubs



Part of the [Civil Procedure Commons](#)

Recommended Citation

Laura Gaston Dooley, *The Cult of Finality: Rethinking Collateral Estoppel in the Postmodern Age*, 31 Val. U. L. Rev. 43 (1996)

This Article is brought to you for free and open access by the Law Faculty Presentations and Publications at ValpoScholar. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.

Fall 1996

The Cult of Finality: Rethinking Collateral Estoppel in the Postmodern Age

Laura Gaston Dooley

Recommended Citation

Laura Gaston Dooley, *The Cult of Finality: Rethinking Collateral Estoppel in the Postmodern Age*, 31 Val. U. L. Rev. 43 (1996).
Available at: <http://scholar.valpo.edu/vulr/vol31/iss1/2>

This Article is brought to you for free and open access by the School of Law at ValpoScholar. It has been accepted for inclusion in Valparaíso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



THE CULT OF FINALITY: RETHINKING COLLATERAL ESTOPPEL IN THE POSTMODERN AGE*

LAURA GASTON DOOLEY**

I. INTRODUCTION

What is a fact, and who gets to say what a fact is? These questions lurk beneath and animate the doctrine of collateral estoppel,¹ or (as we modern types say) issue preclusion, in the law of civil procedure. But neither courts nor scholars have faced these basic questions head-on in considering the efficacy of a doctrine that literally exports findings of fact from one case to other unrelated cases. Instead, discussions about collateral estoppel have focused on the “fairness” of applying the doctrine, particularly in terms of the party to be bound by the predetermined fact and whether it had a “full and fair” opportunity to litigate the issue in the former suit.² Somehow, amazingly, this area of the law has remained analytically untouched by the epistemological upheaval that has revolutionized (some might say scandalized) 20th century philosophy, literary criticism and, to a great extent, jurisprudence—postmodernism.

Postmodernism is a diverse, amorphous amalgam of ideas that ricochets sometimes wildly among academic disciplines. Its various manifestations, though, share at least one core premise in their resolute antifoundationalism—the notion that ideas, principles, even simple facts are not objectively fixed but rather are constructed.³ To appropriate the famous Gertrude Stein quote about

* Copyright 1995, Laura Gaston Dooley.

** Professor of Law, Valparaiso University School of Law. My thanks to Nancy Murphy and Quentin Burrows for excellent research assistance.

1. Collateral estoppel is a common-law doctrine that says that once a fact is determined against a party, it may be used against that party in later, even unrelated cases. *See generally* 18 CHARLES WRIGHT, ET AL., *FEDERAL PRACTICE AND PROCEDURE: JURISDICTIONS* § 4402, at 8-11 (1981). As I like to tell my classes, it's the “been there, done that” doctrine in civil procedure.

2. *See, e.g.,* *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (Supreme Court discussing the fairness of applying collateral estoppel); Brainerd Currie, *Mutuality of Collateral Estoppel—Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957) (analysis of fairness problems with use of collateral estoppel).

3. STANLEY FISH, *Anti-Foundationalism, Theory Hope, and the Teaching of Composition*, in *DOING WHAT COMES NATURALLY* 342, 344-45 (1989) (anti-foundationalist argument made “in a variety of ways and in a variety of disciplines”; listing scholars espousing anti-foundationalism across those disciplines). *See also* RICHARD RORTY, *CONSEQUENCES OF PRAGMATISM* at x/ii (1982):

[W]hat ties Dewey and Foucault, James and Nietzsche together [is] the sense that there is nothing deep down inside us except what we have put there ourselves, no criterion

Oakland—postmodernism teaches that there is no there there.⁴

Legal theorists have used this anti-foundational approach to reexamine a number of legal doctrines, most notably as part of the celebrated (and vilified) critical legal studies movement. Though the central postmodern tenet of anti-foundationalism has received quite widespread acceptance in the literary community, its reception in the legal community has been mixed, to put it mildly. Since it is most frequently applied to dismantle legal doctrines of distinguished pedigree, reaction tends to label it radical and threatening to the stability of the rule of law.

No matter what one thinks of the philosophical consequences of a postmodern approach to law, its methodological value in exposing subtexts and seemingly neutral or inevitable relationships makes employing its techniques worthwhile. In this article I will use two postmodern approaches, post-structuralism and neopragmatism, to rethink the doctrine of collateral estoppel both conceptually and functionally. Part I begins by introducing briefly the poststructuralist techniques articulated (though somewhat inaccessibly) by the French literary theorist Jacques Derrida and later developed by legal scholars. I then use those techniques to demonstrate the instability, first of the doctrine of collateral estoppel in the abstract, and second of a concrete application of the doctrine. Part II explores the teachings of the neopragmatists, especially Stanley Fish, who has consistently demonstrated both the vulnerability of legal texts and how fragmentary and unsatisfying conventional jurisprudence can be. In particular, Fish's notion of meaning generated by "interpretive communities"⁵ has important and interesting implications for our consideration of collateral estoppel. If Fish is right that people's interpretations are inevitably shaped by the communities with which they explicitly or implicitly identify, then the legitimacy of exported factfinding on which collateral estoppel rests must be reexamined in light of the relevant interpretive community. In other words, once it is conceded that truth, and in particular, factfinding, is a product of social construction and may not be externally measured for accuracy, then what

that we have not created in the course of creating a practice, no standard of rationality that is not an appeal to such criterion, no rigorous argumentation that is not obedience to our own conventions.

Id.

4. Gertrude Stein, *quoted in* THE OXFORD DICTIONARY OF MODERN QUOTATIONS 207 (1991).

5. Peter C. Schanck, *Understanding Postmodern Thought and its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505, 2544-45 (1992) (describing Fish's idea: "Each interpretive community to which a person belongs—and one can belong to many such communities simultaneously—unconsciously shapes the methods one employs to understand texts and the norms that generally guide one's behavior or practices in the community."). Professor Schanck's article provides excellent and accessible descriptions of both poststructuralism and the neo-pragmatism of Stanley Fish.

matters most is not whether the fact is "true" or even whether the process that produced that fact was "fair." Instead, what matters is who gets to say what the facts are *in a particular context* and whether given that context the relevant interpretive community has had its say. This, in turn, might require different outcomes depending on locality—what may be true in Poughkeepsie may not be true in Peoria.⁶

This is not as radical a notion as it may at first sound. We have long acknowledged, as we must, that the factfinding process in a trial is far from perfect,⁷ that the snapshot of past events captured in a trial verdict is a blurry representation at best. So the question becomes to what extent we should allocate the scarce trial resources available given the acknowledged lack of authoritative factfinding. In other words, is regard for local community standards worth the cost of relitigation?

Perhaps even more fundamentally, the application of postmodern theory to an analysis of collateral estoppel forces us to take a look at who it is that typically benefits by its use, and who is hurt. I take those questions up in Part III. Interestingly, the theoretical picture can itself produce differing interpretations on this question. At first glance, the doctrine of collateral estoppel would seemingly be of great use to the one-time litigant as against the repeat player; for example, collateral estoppel eases the burden of an individual plaintiff who sues a large manufacturer of a product and is able to use a finding made against that manufacturer in a case brought by an earlier plaintiff. But a closer look might reveal that this "benefit" turns out to be somewhat illusory, because courts have been more reticent to allow those applications of collateral estoppel. Thus, because defensive collateral estoppel (used typically by defendants) is now almost universally accepted as a salutary resource-saving procedural device, while offensive collateral estoppel (used principally by plaintiffs) is viewed more suspiciously as a windfall to the undeserving, the relitigation burden may be falling disproportionately on those most in need of cost-cutting procedural measures. The ironic result is, then, that socially-constructed facts have the force of lasting truth primarily when they benefit the powerful: the large corporation, the government, and the like. The individual litigant, seeking to rely on prior factfinding in her favor, faces obstacles focused

6. See generally *id.* at 2510 ("Knowledge is thus conceived by postmodernists as always contingent, always dependent on context, and always 'local' rather than 'universal,' as it is so often assumed to be.").

7. Judge Jerome Frank was, of course, famously critical of the trial process as a successful means of capturing truth. See, e.g., JEROME FRANK, *COURTS ON TRIAL* 80, 101 (1949).

on the “unfairness” to her opponent.⁸ This produces the perverse result that the most likely beneficiaries of the doctrine of collateral estoppel are those with the most resources, who could better afford litigation and therefore need it less.

Because the decisionmaker under our system of private dispute resolution is either judge or jury, we must also remain sensitive to the fact that the use of collateral estoppel will deprive the jury of its factfinding function.⁹ If you believe, as I do, that the jury is in most situations the superior decisionmaker (being more diverse demographically and more diffuse functionally),¹⁰ then we must examine whether the doctrine of collateral estoppel should be used to circumvent the power of the community to speak in given contexts, despite the inefficiencies that “relitigation”¹¹ may entail.

I. POSTSTRUCTURALISM

Or, When is a Fact Not a Fact

A. *Deconstructing Collateral Estoppel*

Ferdinand de Saussure described language as a structuralist system, in which meaning depends on the relationships among words as a complete system of signs. Each word constitutes a sign system, consisting of the signifier—the written or spoken mark—and the signified—the mental concept it purports to represent.¹² These signs are then organized into oppositional pairs, called binary oppositions.¹³ Thus, we understand “hot” in opposition to “cold,” “up” in opposition to “down” and so forth. Even as to those terms that do not fit neatly into an oppositional pair, we understand their meaning by comparing the

8. The United States Supreme Court approved the potential use of offensive, nonmutual collateral estoppel in the federal court system in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). But before a federal court applies the doctrine, it must consider several “fairness factors” such as whether the plaintiff could have joined in the earlier action and whether there are prior inconsistent verdicts on the books. The ultimate decision is left to the discretion of the trial court. *Id.* at 331.

9. This will of course possibly implement the factfinding done by a previous jury, but because the interpretive community might look quite different in different localities, its use still will thwart the second jury’s function as local community voice in the courtroom. See *infra* notes 69-71 and accompanying text.

10. See generally Laura G. Dooley, *Our Juries, Our Selves: The Power, Perception and Politics of the Civil Jury*, 80 CORNELL L. REV. 325 (1995).

11. I put the word in quotation marks to convey my view that since meaning will fluctuate according both to context and to differing players in the separate litigation, there never will be true repeat litigation.

12. Schanck, *supra* note 5, at 2520.

13. *Id.* at 2521.

reference to what it is not.¹⁴

Post-structuralists, particularly Derrida,¹⁵ took this linguistic paradigm and demonstrated that not only can words, as signs, be divorced from referents in the real world, signifiers and signifieds can be divorced from each other, thus deferring meaning indefinitely¹⁶ and demonstrating the impossibility of “fixing” meaning within the confines of a linguistic unit. For example, a dictionary definition of a word itself consists of other words which must be defined, and so on infinitely.¹⁷ We never reach “the thing” itself, only more words. The gap between words and things is never bridged, only deferred.

Derrida coined the word “différance” to describe this linguistic relation. A pun that intersects the verbs “to differ” and “to defer,” the notion is that the meaning of words is not, and in fact cannot be, determinate.¹⁸ One commentator has called this the “chicken-and-egg quality” of Derrida’s thinking;¹⁹ because words exist and can be understood only in terms of their relations with each other, they are always both mutually dependant upon and resistant to other words. Thus, when we think of the meaning of a word like “speech,” rather than conceptualizing that idea in isolation, we think of the word and its opposite—“speech as opposed to writing.”²⁰ Though by focusing on one concept—speech—we privilege²¹ it over its opposite, we see that a “trace”²²

14. This is what makes a word “diacritic”—we understand the word (even if not part of a binary opposition) only in relation to what it is not. See 4 OXFORD ENGLISH DICTIONARY 594 (1989) (diacritic defined as “capable or showing a capacity, of distinguishing or discerning”).

15. See generally JACQUES DERRIDA, OF GRAMMATOLOGY (1976) [hereinafter DERRIDA, OF GRAMMATOLOGY]; JACQUES DERRIDA, POSITIONS (1981) [hereinafter, DERRIDA, POSITIONS]. For an excellent introduction to the thought of Jacques Derrida and its potential application to problems of legal interpretation, see J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987).

16. Schanck, *supra* note 5, at 2523.

17. *Id.* (citing RAMAN SELDEN, A READER’S GUIDE TO CONTEMPORARY LITERARY THEORY 73 (1985)).

18. See definition of “différance” in THE COLUMBIA DICTIONARY OF MODERN LITERARY AND CULTURAL CRITICISM 83 (1995).

19. Balkin, *supra* note 15, at 752.

20. DERRIDA, OF GRAMMATOLOGY, *supra* note 15, at 34-43; Balkin, *supra* note 15, at 753. Deconstructing the speech/writing dichotomy has been central to the project of poststructuralism. See also Schanck, *supra* note 5, at 2526.

21. Or, give it primacy. For a discussion of the concept of privileging in Derrida’s thought, see Balkin, *supra* note 15, at 746-47.

22. *Id.* at 752

The word ‘trace’ is a metaphor for the effect of the opposite concept, which is no longer present but has left its mark on the concept we are now considering. The trace is what makes deconstruction possible; by identifying the traces of the concepts in each other, we identify their mutual conceptual dependence.

Id.

of its opposite is necessary for us to discern what it is as opposed to what it is not.

Deconstructionists use these ideas to demonstrate that since words can only be understood in terms of their *difference from* other words, by *deferring* to other words, their meaning can be inverted; that is, since the "basic" term A actually depends upon the other term B to establish its meaning, B becomes "basic" to A.²³ Thus, we can perform a "deconstructive reversal" by showing that the original term A is as dependent upon B as we have previously assumed B to depend on A, thus making "A's privileged status . . . an illusion."²⁴ The classic illustration of such a reversal is in the philosophical problem of identity versus difference. We privilege the notion of identity, and then define as "different" those things that are not identical.²⁵ Yet we could never tell what is identical without the concept of difference to define it. Thus, the terms are mutually dependent and the notion of identity cannot be privileged.²⁶

Meaning, then, cannot be fixed within the linguistic confines of a word because the word is never stable. This is what deconstructionists mean when they say that there is no "presence" of meaning in a word—there is no unifying, transcendent meaning that is or could be unequivocally conveyed by a word or group of words.²⁷ Moreover, since each term in opposition is necessary to complete the other, it is a subversive presence lurking in the margins of the word because it is capable of overthrowing the hierarchy of what we consider paramount. Derrida calls this the "dangerous supplement":²⁸ the very thing necessary to complete one idea has the potential to destroy it.²⁹

For deconstructionists, then, there can never be meaning that is always and inalterably "present" in words, since words must be understood only through the complex interplay of their interconnection with other words. So what does this mean for the use of collateral estoppel in civil litigation? The doctrine of collateral estoppel rests on the distinctly anti-(and ante-) postmodern notion that

23. *Id.* at 751.

24. *Id.* at 747.

25. This, by the way, has been a central problem of the feminist project: trying to decide whether women should be identified with men and thus receive the same benefits, or whether they are different and entitled to different (and ideally not inferior) treatment. Catharine MacKinnon's work has, in a way, deconstructed this dichotomy by rejecting the idea that women and women's treatment should be measured by their identity with, or difference from, men. See generally CATHARINE MACKINNON, *FEMINISM UNMODIFIED* (1987).

26. Balkin, *supra* note 15, at 748.

27. See generally the definitions of "absence/presence" in *THE COLUMBIA DICTIONARY OF MODERN LITERARY AND CULTURAL CRITICISM* 2 (1995).

28. DERRIDA, *OF GRAMMATOLOGY*, *supra* note 15, at 144.

29. See Balkin, *supra* note 15, at 758-59; Schanck, *supra* note 5, at 2525.

once a fact is fixed, it would be a waste of decisionmaking resources to revisit the factual dispute. Therefore, a fact may be exported from one case to another, at least as against a party that was involved in the initial litigation that fixed the fact.

This assumes that the meaning of the exported fact is somehow "present" in the words used, such that the court in case 2 may readily discern its meaning simply by referring to the text³⁰ produced in case 1. But the idea that there ever can be discernible "presence" of meaning in a text or in a factual finding is rejected by postmodern theory.

In fact, the very thing that makes language useful—what linguists call iterability, or "the property of being able to be repeated in many different contexts"³¹—also means there can be no presence of meaning. Because "the same property of words that allows us to express what we mean requires that we also be able to express what we do not mean,"³² we can speak ironically, or jokingly (as in, sure, I can't wait to go to the faculty meeting).³³ Thus, the poststructuralist approach to language has two essential insights to offer our rethinking of the concept of collateral estoppel. First, the basic anti-foundational worldview precludes us from believing that facts are out there to be discovered and articulated by the factfinder at trial. Rather, they are socially constructed by the unique confluence of the experiences and worldviews of the factfinders and the evidence presented (which itself can be deconstructed).

Second, the indeterminacy of language prevents whatever facts are "found" in a trial from being successfully captured in a sentence whose meaning can be transported intact into a different case. These two insights are inextricably bound. Once it is acknowledged that factfinding in a case is a process of persuasion, control of information (by attorneys and judges),³⁴ and often, in the jury room, compromise, then the seemingly neutral, bright-line statements that emerge and are later offered for use by way of collateral estoppel begin to look suspiciously flawed. As one scholar has observed, in reference to the application of legal rules and doctrines:

30. This may be a case opinion, jury instructions that indicate what decisions the jury must have reached in order to render its verdict, the record of the trial itself, etc.

31. Balkin, *supra* note 15, at 749.

32. *Id.* at 750.

33. Perhaps an old Japanese proverb best captures the key poststructuralist linguistic paradigm: "the reverse side also has a reverse side." Cheryl Lavin, *Fast Track Replays*, CHI. TRIB., Jan. 21, 1996, (Sunday Magazine), at 10.

34. This happens technically through the operation of the rules of evidence, which control what information the jury is allowed to find out.

A text is not a pure presence that immediately and transparently reveals a distinct meaning intended by its author. Instead, from the standpoint of deconstruction, every writing embodies a failed attempt at reconciling identity and difference, unity and diversity and self and other. A writing may give the impression of having achieved the desired reconciliation, but such impression can only be the product of ideological distortion, suppression of difference or subordination of the other.³⁵

When the relevant text is "facts" that are "found" by a jury, we can see in the margins of the statements of the facts they find the suppression of voices who lost out in the struggle of the decisionmaking process. This concern takes on added significance given the uneven distribution of power among the initial decisionmakers. For example, research shows that often the dynamics of the jury room operate to silence the voices of women and minorities.³⁶ Women jurors have a lower participation rate in jury deliberations than their male counterparts and are much less likely to be elected foreperson.³⁷ This has produced concern that the jury's product, including both the verdict and any factual findings flowing from it, are "erroneous."³⁸ And even apart from any accuracy concerns, this suppression thwarts the notion of community input that is at the heart of the jury trial institution. Thus, the initial factfinding supposedly captured by the articulation later proposed for collateral estoppel effect may be tainted by the suppression of some voices. Those voices may, then, whisper only in the margins of the statement of "fact" that purportedly establishes the truth of the matter in the later lawsuit, and this later linguistic suppression becomes all the more troublesome.

This is not to say, of course, that courts have cavalierly ignored the downsides of collateral estoppel, though the fundamental unease that courts sometimes express is usually identified as a concern that the exported fact may simply be "wrong," that is, not historically accurate. It is this concern about exporting possible inaccuracy that gives force to Professor Brainerd Currie's famous train wreck example³⁹ and the exception to the application of offensive,

35. Michel Rosenfeld, *Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism*, in *DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE* 153 (1992).

36. See Nancy S. Marder, *Gender Dynamics and Jury Deliberations*, 96 YALE L.J. 593 (1987).

37. *Id.* at 595.

38. *Id.* at 600.

39. Professor Currie postulated a train wreck in which 50 passengers are injured. If the first plaintiff sues and recovers by showing that the train company was negligent, then later plaintiffs (barring other fairness considerations defeating the use of offensive, non-mutual collateral estoppel—see *supra* note 2 and accompanying text) can theoretically use that finding in their later suits against the train company. But if the first plaintiff sues and loses, the other plaintiffs are not

nonmutual collateral estoppel when prior inconsistent verdicts exist on the issue (i.e. one of them must be wrong, and we don't know which, so no collateral estoppel effect). Moreover, courts applying collateral estoppel have shown some sensitivity to the importance of context, and the potential unfairness of applying the doctrine when a party's financial exposure in the first case gave little incentive to vigorously litigate.⁴⁰ Indeed, the Second Restatement of Judgments advises that collateral estoppel should not be applied when the prior judgment was produced in a case whose circumstances differ significantly from present ones.⁴¹

Moreover, the very policy often cited to justify the use of collateral estoppel—that is, the fear of inconsistent findings—gives lie to the notion that the factfinding would otherwise be consistent and the use of collateral estoppel is simply an efficient, time-saving device. In other words, we justify the use of collateral estoppel because of our fear that different decisionmakers in the context of different cases might make inconsistent findings—this is thought to be somehow unseemly and subversive of the authority of the court system. So in order to mask the uncertainty that inevitably flows from an imperfect system of truthfinding, we extol the virtues of finality. Litigation must come to an end, we say, and our cultish devotion to consistency and finality trumps even if that means that we fossilize the imperfect trial product as “truth.”

B. Deconstructing a Fixed Fact in a Given Trial Context

What all this fancy analysis⁴² boils down to for our purposes here is that facts established by litigation, being as they must be captured by language which is inherently unstable, are themselves inherently unstable (or indeterminate to

bound, since they were not parties to the first plaintiff's suit. If the first plaintiff sues and loses, as do the next 24 plaintiffs, what happens if plaintiff #26 sues and wins? Should plaintiffs #27 through 50 get the benefit of that win by way of collateral estoppel? See Currie, *supra* note 2, at 281-88.

40. See, e.g., *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334 (5th Cir. 1982).

41. RESTATEMENT (SECOND) OF JUDGMENTS § 29 cmt. g (1982):

The circumstances attending the determination of an issue in the first action may indicate that it could reasonably have been resolved otherwise if those circumstances were absent. Resolution of the issue in question may have entailed reference to such matters as the intention, knowledge, or comparative responsibility of the parties in relation to each other. . . . In these and similar situations, taking the prior determination at face value for purposes of the second action would extend the effects of imperfections in the adjudicative process beyond the limits of the first adjudication, within which they are accepted only because of the practical necessity of achieving finality.

Id.

42. “If it is true that there are but two kinds of people in the world—the logical positivists and the god-damned English professors—then I suppose I am a logical positivist.” C. GLYMOUR, *THEORY AND EVIDENCE* ix (1980), quoted in Dale Jamieson, *The Poverty of Postmodernist Thought*, 62 U. COLO. L. REV. 577, 594 n.54 (1991).

use the more CLS-ey term).⁴³ Thus, even assuming that we could come up with a coherent justification for exporting factfinding to different contexts (based, probably, on the marginal value of repeating costly litigation versus the efficiency produced by applying collateral estoppel), we would still be left with the problem of indeterminacy in the language, producing potential interpretive problems that may dwarf the costs of simply repeating the litigation.

Let's try to test this by using a finding in commonplace civil litigation. We'll call this the Dooley chainsaw massacre, for reasons that will, I hope, become clear. Chainsaws are, I am sure we can agree, potentially dangerous tools. Purchasers of chainsaws are sometimes injured by their use. The purchaser who believes that negligent design of the chainsaw is the cause of his accident may choose to sue the manufacturer, or the retailer from whom he bought the chainsaw, or the regional distributor, and so on.⁴⁴ A key issue in such litigation, one usually decided by a jury as factfinder, will be whether the chainsaw in its design is *unreasonably dangerous*.⁴⁵ On the surface, it would seem that this finding should not vary from context to context, assuming that the same model is involved in multiple litigation. But what would a deconstructionist say about the statement "Dooley Chainsaw Model X is an unreasonably dangerous product"?

The deconstructionist would identify the binary oppositions that undergird this finding of fact and conclude that there are at least two: first, the word dangerous is understood only in relation to its binary opposite, safe. And second, the word unreasonable is opposed, obviously, to reasonable, here probably understood as an articulation of an acceptable/unacceptable dichotomy.

43. See Schanck, *supra* note 5, at 2528 (these are unstable, no matter how strong the impulse to fix them).

44. Unfortunately, these accidents are not only hypothetical. See, e.g., Clemenz v. Sears Roebuck & Co., 986 F.2d 1426 (10th Cir. 1993) (plaintiff injured while operating a tablesaw when it "kicked back"); Cates v. Sears Roebuck & Co., 928 F.2d 679 (5th Cir. 1991) (consumer lost three fingers due to the alleged kickback of a radial arm saw); Deviner v. Electrolux Motor, AB, 844 F.2d 769 (11th Cir. 1988) (employee injured when chainsaw kicked back and cut the top of his right wrist); Vogt v. Emerson Elec. Co., 805 F. Supp. 506 (M.D. Tenn. 1992) (radial arm saw buyer was injured when he caught his hand in a saw); Sargia v. Skil Corp., No. 84 Civ. 7107, 1985 WL 5126 (S.D.N.Y. Dec. 16, 1985) (plaintiff sought damages for the loss of the tip of his index finger allegedly due to design defect in circular power saw); Albanese v. Emerson Elec. Co., 552 F. Supp. 694 (D. Del. 1982) (worker brought action against chainsaw manufacturer for kickback that resulted in serious injuries to his right forearm); Perkins v. Emerson Elec. Co., 482 F. Supp. 1347 (W.D. La. 1980) (woodcutter brought action against manufacturer of chainsaw for injuries sustained when the chainsaw kicked back); Elliott v. Sears Roebuck & Co., 527 N.E.2d 574 (Ill. App. Ct. 1988) (purchaser of radial saw brought action against retailer and manufacturer of saw that kicked back while purchaser was using it to cut wood).

45. See RESTATEMENT OF TORTS § 402A for the elements plaintiffs must prove to make out a products liability claim.

Taking first the safe/dangerous dichotomy, the deconstructionist would note that safe is the privileged concept, the one that we consider the "standard" to which we aspire. But no product is completely safe, of course, as evidenced by the freak accidents with exploding soda cans and the like that year after year thrill and bewilder tort students across the country. There is always danger lurking in everything we consider to be safe.⁴⁶ And conversely, seemingly dangerous things, like chainsaws, can be and routinely are used safely, and serve useful and necessary purposes for consumers. Thus, a jury determination that a particular chainsaw model is dangerous does not necessarily mean that it cannot be safely used; its potential safety lurks in the trace of the concept presumably captured by the word dangerous. Instead, that determination reflects something of a linguistic compromise: the events depicted in that trial (a horrific accident, say) led the decisionmaking jury, constrained as it was by the zero-sum-game structure of the verdict-reaching process,⁴⁷ to say that the product was dangerous.

The "unreasonably" part of the text presents a similar problem. In fact, that word might initially seem to serve the function in the sentence of parsing the very difficulty that is produced by the dangerous/safe dichotomy: to say that something is *unreasonably* dangerous certainly implies that we sometimes accept a certain level of danger as reasonable. But reasonableness is a quintessentially fuzzy word, maybe especially for those of us who study law. Reasonableness is purportedly some kind of standard having some kind of objective content. Thus, in tort law one encounters the mythical "reasonable man," the more modern "reasonable woman" (apparently such a creature didn't always exist), and in our egalitarian times the "reasonable person." But most of us would readily acknowledge, I think, that what is reasonable is whatever those who have decisionmaking power say is reasonable. In other words, rather than holding a litigant's conduct to the supposedly objective standard, a decisionmaker is simply deciding whether the conduct is acceptable, then labeling it reasonable, or unacceptable, which then carries the "unreasonable" label. This, by the way, is not to say that the decisionmaker is failing at its assigned task; a post-modernist would say that the decisionmaker is simply doing the best that it can do given its inability to transcend its own ideological biases.⁴⁸

46. One is reminded of the "undertoad" of John Irving's novel *The World According to Garp*: when Garp's children play in the seemingly placid surf they are warned to "beware the undertoad"—the actual and metaphorical danger that always lurks beneath the surface.

47. See Laura G. Dooley, *Sounds of Silence on the Civil Jury*, 26 VAL. U. L. REV. 405 (1991) (arguing that the zero-sum-game structure of the civil jury trial—if defendant wins, plaintiff must lose—suppresses the voices of some jurors).

48. In asbestos litigation, the issue of whether asbestos is a dangerous product is one that repeats from case to case. When plaintiffs attempted to use offensive, nonmutual collateral estoppel against manufacturers to foreclose relitigation of that issue, the Fifth Circuit Court of Appeals rejected the attempt, noting that "this Court certainly did not decide [in a prior asbestos case] that

This linguistic problem is more acute as to findings that involve applying law to fact. Although a deconstructionist could, no doubt, perform this postmodern operation on a mundane evidentiary fact like "Defendant ran the red light" or even "Plaintiff was wearing a green coat," I will not attempt to take my argument that far.⁴⁹ Findings that involve the application of law to fact, like the dangerousness of a product, or whether particular conduct constitutes negligence, are the sorts of facts that are most vigorously asserted as a basis for collateral estoppel effect, and have the most direct impact on the subsequent litigation. If it does seem less troubling to "fix" evidentiary-type facts, it can be at least partially explained by citing to what appears to be broader societal consensus as to shared understandings of words like "red light" than there is as to words like "unreasonably dangerous."

Leading scholars like Cass Sunstein have criticized deconstruction as a tool for legal theory by arguing that it ignores such consensus: "Deconstruction with the law [which] amounts in practice to quite ordinary efforts at undermining a particular line of reasoning, is inadequate in large part because it fails to account for interpretive norms and criteria. In law and elsewhere, texts have relatively fixed meanings because of shared interpretive principles."⁵⁰ The problem with collateral estoppel, though, is that when facts are "fixed" by this doctrine, we cannot be sure of interpretive norms like those that pervade the legal profession. The typical factfinder, the civil jury, is non-repeating, and even if it were the same, the facts are constructed, by definition, in different contexts. Unless it can be said that all people (not just lawyers) share interpretive principles such that juries could predictably reach the same result via factfinding as collateral estoppel produces, a notion belied by our fear of inconsistent verdicts that justifies the doctrine, then the doctrine is, inevitably, an arbitrary attempt at fixture of something that refuses to be static.

II. INTERPRETIVE COMMUNITIES IN THE COURTROOM

In exporting his literary theory to legal contexts, Stanley Fish has relentlessly, and some would argue more consistently than anyone else,⁵¹ pressed

every jury presented with the same facts would be compelled to reach the conclusion reached by the *Borel* jury: that asbestos was unreasonably dangerous. Such a holding would have been not only unnecessary, it would also have been unwarranted." *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334 (5th Cir. 1982) (quoting *Migues v. Fibreboard Corp.*, 662 F.2d 1182, 1188 (5th Cir. 1981)).

49. For an interesting deconstructive operation on the seemingly straightforward constitutional provision requiring that a president of the United States be at least thirty-five years old, see Schanck, *supra* note 5, at 2528-32.

50. Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 463 n.216 (1989).

51. Schanck, *supra* note 5, at 2530.

the anti-foundationalism that undergirds his theory about the construction of meaning.

Anti-foundationalism teaches that questions of fact, truth, correctness, validity, and clarity can neither be posed nor answered in reference to some extracontextual, ahistorical, nonsituational reality, or rule, or law, or value; rather, anti-foundationalism asserts, all of these matters are intelligible and debatable only within the precincts of the contexts or situations or paradigms or communities that give them their local and changeable shape.⁵²

According to Fish, then, when conditions behind a word change, because it is iterable in different contexts, its meaning changes: “[A]ll texts are equally and radically orphaned in the sense that no one of them is securely fastened to an independently specifiable state of affairs.”⁵³ Moreover, facts that seem to us static and impervious to challenge are illusions:

[U]nassailable facts are unassailable only because an act of persuasion has been so successful that it is no longer regarded as one, and instead has the status of a simple assertion about the world. In short, there are no facts that are not the product of persuasion, and therefore no facts that stand to the side of its operations; all agreements are the result of the process . . . and therefore no agreement, however securely based it may seem for the moment, is invulnerable to challenge.⁵⁴

To the extent that interpretations seem to achieve some sort of constancy, Fish attributes that to the phenomenon of shared interpretive constraints that operate within particular communities, which Fish calls “interpretive communities.”⁵⁵ People do not (cannot) choose to join particular interpretive communities; rather, these communities shape the consciousness (ideology) of people who become, as it were “community property.”⁵⁶

This Fishian (Fish-like, Fish-esque, maybe just Fish-y) view of the world is not just a fancier way of saying that subjectivity defines truth. Fish’s

52. FISH, *supra* note 3, at 344.

53. STANLEY FISH, *With the Compliments of the Author: Reflections on Austin and Derrida*, in *DOING WHAT COMES NATURALLY* 37, 44 (1989).

54. STANLEY FISH, *Short People Got No Reason to Live: Reading Irony*, in *DOING WHAT COMES NATURALLY* 194 (1989).

55. STANLEY FISH, *Introduction: Going Down the Anti-Formalist Road*, in *DOING WHAT COMES NATURALLY* 1, 30 (1989). See also Schanck, *supra* note 5, at 2544.

56. STANLEY FISH, *Change*, in *DOING WHAT COMES NATURALLY* 141, 141 (1989).

interpreter is not free to simply choose an interpretation she likes best; she is constrained by the conventions of her interpretive community. If factfinding is a process of interpretation, if Fish is right that facts are constructed, then what matters is *who* gets the final say about what the facts are. As another scholar puts it, "[i]n postmodern thought . . . the community plays an indispensable role. It is the community that must decide when to take anomalous facts seriously [L]anguage and the search for knowledge are communal achievements."⁵⁷

Furthermore, proponents of postmodern hermeneutics,⁵⁸ most importantly Hans-Georg Gadamer, make a corresponding claim about the process of interpretation, which of course is what judges must do when they apply collateral estoppel. To apply a previously-decided fact in subsequent litigation, a judge must, explicitly or implicitly, perform an interpretive action on the text that purports to capture that fact. But because of the instability of language, and the impossibility of any person, including (especially?) a judge, extracting himself from his own interpretive community, the interpretive act itself creates meaning. Gadamer teaches that the hermeneutic act is "one unified process"⁵⁹ involving understanding, interpretation and application.⁶⁰ This is not to say that the judge applying collateral estoppel will arbitrarily or subjectively attach meaning to the "text" of the fact. The judge himself or herself is constrained by the tradition of his or her own interpretive community, and reaffirms and recreates that tradition by each interpretive act that he or she performs.

So, then, if the truth fixed by collateral estoppel is a manifestation of the interpretive tradition of judges, why is that any more difficult a problem than the longstanding and still-heated debate about legal hermeneutics in general (like the one between Dworkin and Fish⁶¹ or Fiss and Fish⁶² or just about everyone else and Fish).⁶³ Here's why: we assign *legal* interpretation tasks to judges

57. Nancey Murphy, *Scientific Realism and Postmodern Philosophy*, 41 BRIT. J. PHIL. SCI. 291, 295 (1990).

58. An excellent description of this strand of postmodernism can be found in Stephen M. Feldman, *Diagnosing Power: Postmodernism in Legal Scholarship and Judicial Practice (With an Emphasis on the Teague Rule Against New Rules in Habeas Corpus Cases)*, 88 NW. U. L. REV. 1046, 1060-65 (1994).

59. HANS-GEORG GADAMER, TRUTH AND METHOD at 308 (1989), *quoted in* Feldman, *supra* note 58, at 1064.

60. *Id.*

61. See STANLEY FISH, *Working on the Chain Gang: Interpretation in Law and Literature*, in *DOING WHAT COMES NATURALLY* 87 (1989) (Fish's reply to Ronald Dworkin's essay *Law as Interpretation*, 60 TEX. L. REV. 527 (1982)).

62. See STANLEY FISH, *Fish v. Fiss*, in *DOING WHAT COMES NATURALLY* 120 (1989) (responding to Owen Fiss's essay *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982)).

63. See also STANLEY FISH, *Don't Know Much About the Middle Ages: Posner on Law and Literature*, in *DOING WHAT COMES NATURALLY* 294 (1989).

in our dispute resolution system. It is their job to figure out what the precedent is, what it means, and whether and how to apply it. But the traditional distribution of power in our system assigns factfinding tasks to juries, a one-time established interpretive community for each case, on the assumption that general community values are most directly given force through that institution. To the extent that collateral estoppel allows a judge to usurp the jury's traditional role, we get a much more limited interpretive community represented, and no doubt a more elitist one at that.⁶⁴

Thus, the seemingly simple task of applying a fact already found is disturbingly vulnerable to interpretive difficulties. But this strain of postmodern thinking helps to uncover yet another concern about applying collateral estoppel. Once a fact has achieved a certain pedigree (actually litigated, decided and necessary to the judgment),⁶⁵ then it will be treated as a done deal in subsequent litigation as against someone who was a party to the prior suit. But treating it as a done deal is a way of crystallizing into "truth" what was simply an interpretative act of the initial factfinder. The fact was negotiated, not found, the product of superior persuasion in a particular context,⁶⁶ *a social construction*.

This insight has important implications for those who are concerned about decisionmaking power and how it is allocated. In civil litigation, there are two possible decisiomakers—judge and jury. The use of collateral estoppel thwarts the decisionmaking power in the second suit of whoever—judge or jury—would otherwise be charged with the task of establishing the facts.

There are four possible scenarios to consider here. First, the decision-maker in suit 1 whose finding is to be applied in suit 2 may have been a judge. That judge was a microcosm of the interpretive communities to which he belongs, and whatever factual findings he arrived at are, consciously or not, a product of that. Let's assume that this judge was, as most actually are,⁶⁷ a white middle-aged man.

64. See Dooley, *supra* note 10 (noting the declining power of the civil jury as its demographic diversification increased).

65. See JACK H. FRIEDENTHAL, CIVIL PROCEDURE § 14.11 (2d ed. 1993) (outlining essential prerequisites for applying collateral estoppel).

66. See PAUL BRODEUR, OUTRAGEOUS MISCONDUCT 61 (1985) (stating that the finding of dangerousness in the first litigated asbestos case was a product of jury compromise).

67. See Carl Tobias, *Closing the Gender Gap on the Federal Courts*, 61 U. CIN. L. REV. 1237 (1993). See also COMMISSION ON WOMEN IN THE PROFESSION, REPORT TO THE HOUSE OF DELEGATES OF THE AMERICAN BAR ASSOCIATION 6 (Hillary Rodham Clinton, Chair, 1988) (noting that as of 1988, only 7.4% of the federal judiciary and 7.2% of state judges were women).

Now a second suit arises in which a finding from that previous case may be applied by way of collateral estoppel. This second suit, let's say, is pending in a court presided over by an African-American, youngish, female judge, without a jury. Absent collateral estoppel, this second judge would be required to make findings of fact.⁶⁸ Would the interpretive communities to which the second judge belongs lead her to interpret the evidence precisely as the previous judge did? If not, or even maybe not, then we must ask whether the application of collateral estoppel will serve to fossilize a version of truth out of sync with the relevant interpretive community.

The problem is perhaps even more acute if, in the second scenario, we imagine that the decisionmaker to be used in the second suit is a jury. One of the long-esteemed features of the jury system is that it brings to bear the interpretive faculties of twelve people, rather than just one. To the extent that collateral estoppel fixes a fact such that it is removed from jury consideration, that communal perspective is lost.

What if the initial decisionmaker was a jury? For the third scenario, let's suppose that both suits are jury cases. Applying collateral estoppel, then, will substitute the factual constructions made by the first jury for those that would be made by the second. Though this may, in theory, vindicate the jury system, it still poses dangers to *local* community interpretation,⁶⁹ with the local generation of meaning central to postmodernist thought. Moreover, in terms of the legitimacy of the factfinding, the jury from case 1 has authority (governmental, and in a sense contractual, since the parties agree to abide ultimately by the court's decision) to construct facts for case 1. It does not have authority to construct facts for case 2—authority for that is vested in judge/jury 2.

And for the final scenario, assume that a judge who will be the factfinder in suit 2 is considering applying collateral estoppel to use facts found by a jury in the earlier suit. In this scenario, collateral estoppel will produce the seemingly salutary result that a jury-mediated fact will be given truth status in a later case, preventing the judge from substituting his or her own individual judgment. But remember Gadamer's interpretive circle—the judge's interpretation may alter the intended meaning of the fact. And even if that seems less

68. Note also the difference in standards of review: the decision whether to apply collateral estoppel is an issue of law and the appellate court will evaluate the trial court's ruling *de novo*. But a trial court's finding of fact is given more deference and only overturned if "clearly erroneous." See generally FRIEDENTHAL, *supra* note 65, § 13.4, at 603-04.

69. For postmodernists, the construction of meaning is quintessentially local. See, e.g., FISH, *supra* note 3, at 344 (matters of fact and truth "are intelligible and debatable only within the precincts of the contexts . . . or communities that give them their local and changeable shape").

troublesome than a wholesale substitution of judge-found facts for the prior jury-found facts, again locality is an issue: since both judges and juries are drawn typically from the immediate vicinity of courts, the earlier finding may have been made in a different local context.⁷⁰ Moreover, in this, as in the other three scenarios, the decisionmaker chosen by the parties (or at least by the plaintiff, who typically chooses the forum) in the second suit is losing authority to the decisionmaker in the first suit.⁷¹

Thus, our postmodern analysis has uncovered a host of potential issues that should concern us with regard to the idea of exporting factfinding. First, there is the linguistic difficulty. Facts that are found must be articulated. But because language bears the vulnerability of instability, efforts to capture facts in language are unsatisfying. And even if they could be so captured, even if we were satisfied that the meaning of words could be fixed such that later users would unequivocally discern their meaning, we have a further problem. The facts found are themselves social constructions, the product of whatever interpretive biases the decisionmaker brought to bear on his or her (or its) task. And to the extent that the decisionmaker in the later suit may hail from different interpretive communities, then those voices will not be heard because of the operation of collateral estoppel.

III. WHO BEARS THE COST OF COLLATERAL ESTOPPEL?

Exposing this inherent instability in both the conceptual foundation of collateral estoppel and its application might lead us to question whether its use is arbitrary. In other words, if facts found in prior proceedings are inherently unstable both as to their initial formation and as to their articulation, then we must examine what possible benefits flow from artificially fixing those facts. And perhaps even more importantly, we must examine *who* benefits from this purported fixity.

70. Postmodernism teaches that all factfinding, no matter who the decisionmaker, judge or jury, will be locally shaped and changeable. *Id.*

71. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). In *Parklane Hosiery*, the Supreme Court considered and rejected the claim that the use of offensive nonmutual collateral estoppel defeated the defendant's right to a jury trial. The first case, which produced the findings later offered for collateral estoppel, was judge-tried because it was an enforcement action brought by the Securities and Exchange Commission. The defendant argued in the second case that because it had a right to a jury in that action, the Seventh Amendment precluded the use of collateral estoppel. A majority of the Supreme Court disagreed, noting that "many procedural devices developed since [the passage of the Seventh Amendment] have diminished the civil jury's historic domain [and] been found not to be inconsistent with the Seventh Amendment." *Id.* at 336. This provoked a sharp dissent from Justice Rehnquist. *Id.* at 337-56 (Rehnquist, C.J., dissenting).

The benefit of collateral estoppel is commonly said to be that the precious limited resource of court time should not be squandered by redoing what has been done before. This is the “been there, done that” rationale. The beneficiaries are said to be both the parties, who are saved the cost of relitigation, and the publicly-financed court system, which can focus its attention on other pressing matters.⁷² Interestingly, though, the application of collateral estoppel has never been automatic, even when its essential elements are met. Instead, it is said to be a “discretionary” doctrine, and judges can and do refuse to apply it based on so-called “fairness” or “justice” concerns.

Traditionally, collateral estoppel could only be invoked by someone who was a party to the prior action in which the finding was made. This rule, known as the rule of mutuality,⁷³ had a satisfying symmetry to it: you could only benefit from prior factfinding if you would have been bound had the prior finding gone against you. In 1942, Justice Traynor of the California Supreme Court wrote a groundbreaking decision rejecting the mutuality rule for the first time, saying that “no satisfactory rationalization has been advanced” for it.⁷⁴ Instead, Traynor said, collateral estoppel could properly be applied as long as the party *against whom* it is used was a party to the prior litigation.

Courts slowly began to follow California’s lead in abandoning the mutuality rule, but another distinction developed—the distinction between defensive and offensive nonmutual collateral estoppel.⁷⁵ When collateral estoppel was invoked by someone defending on a claim, it was thought to serve the salutary purpose of preventing a plaintiff from getting more than one bite at the apple. For example, imagine that a purchaser of a chainsaw is injured by its use, sues the manufacturer and loses on the issue of the dangerousness of the product. The purchaser then sues the retailer who sold him the chainsaw (as tort law authorizes him to do). The retailer can invoke collateral estoppel to preclude the purchaser from relitigating the issue of the product’s dangerousness since that issue was decided against the purchaser in the prior lawsuit. In the ubiquitous metaphorical phrase, the purchaser cannot get two bites at the apple by suing these defendants separately; he is bound by the factfinding against him in the first case.

Offensive nonmutual collateral estoppel, by contrast, is used by someone pursuing a claim against a party who has lost a previous case brought by someone else. For example, imagine that our chainsaw plaintiff won his case

72. FRIEDENTHAL, *supra* note 65, at 660.

73. *See id.* at 688 (“[m]utuality is premised on the notion that all litigants should be treated equally, that no person should benefit from a judgment when he stood to lose nothing by it”).

74. *Bernhard v. Bank of Am. Nat’l Trust & Sav. Ass’n*, 122 P.2d 892 (Cal. 1942).

75. FRIEDENTHAL, *supra* note 65, at 690-91.

against the manufacturer, with the court making a specific finding that the chainsaw is an unreasonably dangerous product. A later plaintiff now sues the chainsaw manufacturer and seeks to prevent the manufacturer from relitigating the issue of the dangerousness of the same product.

Since the demise of the mutuality rule, courts have been much more reticent to allow collateral estoppel to be used offensively than defensively.⁷⁶ For example, in the federal court system, the United States Supreme Court approved the use of defensive nonmutual collateral estoppel in 1971, against a patent holder who kept suing alleged infringers despite the fact that its patent had been declared invalid in previous litigation.⁷⁷ Eight years later, the Court considered the propriety of offensive nonmutual collateral estoppel, in a case involving private citizens who wished to use a prior finding of liability obtained by the Securities and Exchange Commission against a company.⁷⁸ The Court concluded that because offensive use did not "promote judicial economy in the same manner as defensive use" does, and because it "may be unfair to a defendant,"⁷⁹ trial courts must have "broad discretion to determine when it should be applied."⁸⁰ Courts are to consider factors such as whether plaintiffs adopted a "wait and see" attitude, trying to take advantage of prior litigation, whether defendants had sufficient incentive to litigate vigorously in the earlier case and could have foreseen the later use of factfinding against them, and whether prior judgments reached inconsistent results on the issue to be precluded.⁸¹

By requiring that these "fairness" factors be considered before courts apply offensive nonmutual collateral estoppel, the Court sent a message that this type of collateral estoppel should be harder to invoke than its defensive counterpart.⁸² And that in fact seems to be what has happened in the lower courts: defensive nonmutual collateral estoppel is more routinely allowed than

76. *Id.* See also E. H. Schopler, *Mutuality of Estoppel as Prerequisite of Availability of Doctrine of Collateral Estoppel to a Stranger to the Judgment*, 31 A.L.R. 3D 1044, 1072 ("The courts are more inclined to permit the defensive, than the offensive, use of the doctrine of collateral estoppel.").

77. *Blonder-Tongue Lab., Inc. v. University of Ill. Found.*, 402 U.S. 313 (1971).

78. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

79. *Id.* at 329-30.

80. *Id.* at 331.

81. *Id.* at 330-31.

82. See Steven C. Malin, *Collateral Estoppel: The Fairness Exception*, 53 J. AIR L. & COM. 959, 975-76 (1988) (The Supreme Court "expressly recognized the difference between the two types of preclusion and created a stricter rule for offensive cases.").

offensive, nonmutual collateral estoppel.⁸³ In fact, some state courts abandoned the mutuality rule as to defensive, but not offensive collateral estoppel.⁸⁴

So what does this mean for evaluating how the costs and benefits of collateral estoppel are distributed? First, individuals are much more likely to enter the litigation arena as plaintiffs; and though far from universal, defendants are much more likely to be corporations or, maybe, the government. As to the government, there is no speculating as to the outcome of the collateral estoppel question: the Supreme Court has held that offensive nonmutual collateral estoppel may never be used against the federal government.⁸⁵

Thus, if the paradigm case involves an individual plaintiff suing a corporate or governmental defendant, then the rules imposing a premium on the offensive use of collateral estoppel tend to hurt the individual plaintiff—who is more likely the party with fewer litigational resources. To put it in concrete terms, imagine again our chainsaw plaintiff. We have seen that the finding that the chainsaw is or is not unreasonably dangerous is inherently unstable, that it is a social construction produced by the interpretive communities represented by the prior decisionmaker, and that even the sentence purporting to capture the fact of dangerousness itself may be deconstructed.

Yet maybe we have decided that, despite the instability of the factfinding, we have put enough resources into determining the fact of dangerousness, and we cannot afford further litigation on the point. We choose to live with the possibility that exporting that factfinding to a second case will fossilize something that defies fixture, and is in a sense not truth, but is the best we can

83. Indeed, an informal survey of the reported federal cases on WESTLAW decided during the 1990s seems to point to a significant discrepancy in the relative availability of offensive versus defensive collateral estoppel. Of 40 reported cases involving the proposed use of offensive collateral estoppel, the use was denied in 25 cases and allowed in 15, for an allowance percentage of 37.5%. In defensive collateral estoppel cases, the court denied use in 22 of 53 cases, for an allowance percentage of 58%.

84. FRIEDENTHAL, *supra* note 65, at 690-91 (New Jersey, Massachusetts, Ohio, Illinois, Missouri). See also Malin, *supra* note 82, at 969. In those states that have abandoned mutuality for both offensive and defensive use of collateral estoppel, the approval of offensive use typically came much later. Arizona, for example, allowed defensive collateral estoppel as early as 1965, but did not allow offensive use until 1986. See Lisa Glow, Note, *Offensive Collateral Estoppel in Arizona: Fair Litigation vs. Judicial Economy*, 30 ARIZ. L. REV. 535, 536 (1988). Some states follow the federal practice of imposing "fairness" barriers to the use of offensive, but not defensive, collateral estoppel. FRIEDENTHAL, *supra* note 65, at 693.

85. *United States v. Mendoza*, 464 U.S. 154 (1984). The rationale is that since the government litigates issues with national repercussions, offensive nonmutual collateral estoppel might artificially "freeze" one decision with far-reaching implications, forcing the government to appeal each to the Supreme Court.

do to get to the truth. That is the cost of conserving resources, of affording some finality, of getting on to other important questions. That is the cost of collateral estoppel. So perhaps we, like most courts, will not suffer many qualms when we tell the plaintiff chainsaw purchaser that he cannot relitigate the issue of dangerousness against the retailer after losing it in his suit against the manufacturer. Sorry, buddy, no two bites at the apple, we say.

But what if our chainsaw purchaser *wins* on the dangerousness issue against the manufacturer? If another purchaser of the same model chainsaw suffers an accident and sues the manufacturer, will the court allow that purchaser to use the factfinding on dangerousness? In some states, the court cannot even consider the possibility.⁸⁶ In most, as in the federal system, the court must conduct painstaking inquiry into whether this plaintiff is trying to take unseemly advantage of the prior win of the stranger, whether the manufacturer had adequate incentive to vigorously litigate the first suit, and so on.⁸⁷ Thus, an inequity is built into the distinction between offensive and defensive collateral estoppel; we are more willing to give truth status to the factfinding that benefits the relatively more powerful litigant.

IV. CONCLUSION—SOME FINAL THOUGHTS ABOUT FINALITY

The urge to “fix” things, to capture reality, to know the truth is a strongly seductive one for all of us. The idea of achieving some sort of stability, of settling down, appeals at a very basic level. But it is important, always, to ask at what cost finality is achieved. Indeed, we have seen many seemingly intractable categories break down in recent years, and often for the better. Fixed notions of gender, race, class, and so on have been deconstructing,⁸⁸ and though that breakdown often causes cultural unease in the short term, it may ultimately produce greater human fulfillment in the long term.

In the law, postmodern theory has been both a boon and a bust, a blessing and a curse.⁸⁹ Exposing the instability of texts that we hold in high esteem (like, say, the Constitution) both liberates those who are interested in positive social change and frightens those who worry about an amoral, groundless society. And it seems to me that there are traces of, dare I say it, truth in both views. Perhaps postmodern theory is itself a dangerous supplement to our

86. See *supra* note 84.

87. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330-31 (1979).

88. See generally Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296.

89. As one commentator puts it, “As a way of reading texts, it can be liberating. As a philosophy, forget it.” Dale Jamieson, *The Poverty of Postmodernist Theory*, 62 U. COLO. L. REV. 577, 595 (1994).

worldview. But as thinkers like Gadamer have urged, we must be relentless in our questioning: not only must we question our premises, we must also question our questions. Finality, then, becomes an elusive, as well as ephemeral, goal.

In any event, it seems to me that this analysis requires us to confront head-on the costs of our efforts to fix reality, here in particular through collateral estoppel. We have seen that collateral estoppel artificially fixes as true a finding that simply represents the ideologically-determined interpretation of an initial factfinder, purportedly captured in unstable language. This, in turn, forces us into a reexamination of the costs and benefits of this practice in a world with admittedly scarce decisionmaking resources.

We must remain vigilant to ensure that we not become so enamored with the ideas of consistency and efficiency that we fail to notice the potential damage done. Our cult-like devotion to finality is dangerous if it prevents us from considering the litigation interests of those with the least access to other means of power.